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No. 82-314

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CARL WHITE, Superintendent, Missouri Training Center for Men, Moberly, Missouri,
Petitioner,

v.

DOUGLAS W. THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

MICHAEL H. FINKELSTEIN
Assistant Attorney General

8th Floor, Broadway State Office Building
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED

In 1961 a police officer was shot and killed in Cape Girardeau County, Missouri. Douglas Wayne Thompson was convicted of that murder and sentenced to death, Eventually, that conviction and sentence was reversed by the Missouri Supreme Court and Thompson was retried in 1966. Pursuant to State law the Circuit Court judge directed the sheriff to select seventy-two veniremen. Those veniremen were extensively *voir dired* and a petit jury selected. At no time did Thompson's privately retained attorney either inquire into the veniremen selection process or contemporaneously object in any way to the jury selection process.

1. Whether the Eighth Circuit erred by concluding that Thompson could raise the jury selection issue despite the fact that his attorney never contemporaneously objected to, nor on the record inquired into the veniremen selection process; specifically, did the Eighth Circuit define the "cause" part of the *Francis* v. *Henderson* test so broadly as to, in effect, vitiate it.

2. Did the Eighth Circuit err by concluding that Thompson could raise the jury selection issue because he suffered "actual prejudice" in that a sheriff selected the veniremen from which the petit jury was formed; specifically, did the Eighth Circuit err in concluding that the "actual prejudice" part of the *Francis* v. *Henderson* test had been met in light of testimony from Thompson's attorney that Thompson received a fair trial and that the sheriff who selected the veniremen was no way involved with the investigation of a crime which occurred in another county five years earlier.

3. Did the Eighth Circuit err in reversing Thompson's conviction upon concluding that he had met the "cause"

and "actual prejudice" test of *Francis* v. *Henderson* without deciding that the jury selection process was indeed unconstitutional.

4. Whether the jury selection process at issue here was unconstitutional because a sheriff selected the veniremen.

PARTIES

All the parties in this case are listed in the caption of the case.

PETITION FOR CERTIORARI

Petitioner, Carl White, Superintendent, Missouri Training Center for Men, Moberly, Missouri, respectfully requests that a writ of certiorari issue to the Eighth Circuit to review its judgment and opinion issued anent this case on June 4, 1982.

OPINIONS BELOW

The opinion from which this petition flows was handed down by the United States Court of Appeals for the Eighth Circuit on June 4, 1982, in the case styled: *Douglas W. Thompson* v. *Carl White,* No. 81-1092. To the best knowledge of petitioner this opinion has yet to be published.

The Eighth Circuit opinion noted above followed an appeal taken from an order issued by United States District Court Judge Edward L. Filippine, United States District Court, Eastern District, Eastern Division, of Missouri. That Order was issued on January 14, 1981, and denied Thompson's petition for a writ of habeas corpus for the reasons stated in the "Report and Recommendation" of United States Magistrate David D. Noce which was issued on December 17, 1980. To the best knowledge of petitioner neither the Order of Judge Filippine nor the "Report and Recommendation" of the United States Magistrate has been published. The case before the Magistrate and Judge Filippine is styled: *Douglas W. Thompson* v. *Carl White,* No. 77-1122 C(3), United States District Court, Eastern District of Missouri, Eastern Division.

The Order of Judge Filippine was appealed to the Eighth Circuit; on October 14, 1981, the Eighth Circuit issued an opinion in which it concluded that Thompson's Mississippi County conviction was illegally obtained because the jury was unconstitutionally composed. Pursuant thereto the undersigned, on behalf of petitioner, filed on January 12, 1982, a Petition for Writ of Certiorari in which it was requested that this Court review the just-referred to opinion of the Eighth Circuit issued on October 14, 1981.

On April 26, 1982, this Court entered an order granting petitioner's Petition for Writ of Certiorari and remanded the case to the Eighth Circuit for further consideration in light of *United States* v. *Frady*, 50 U. S. L. W. 4388 (April 5, 1982, No. 80-1595).

On June 4, 1982, without any further briefing or oral argument, the Eighth Circuit issued a four page opinion in response to this Court's Order of April 26, 1982. The Eighth Circuit's cursory four page opinion of June 4, 1982, basically affirmed the Eighth Circuit's earlier opinion in this case; once again that court concluded that Thompson's Mississippi County conviction ought to be reversed. On the same date of its June 4, 1982, opinion the Eighth Circuit issued its mandate and remanded the case to the District Court for further proceedings.

On June 14, 1982, Judge Filippine issued an order in *Thompson* v. *White*, No. 77-1122 C (3), vacating Thompson's Mississippi County conviction and directing that the State of Missouri commence prosecution of Thompson within sixty days; on June 23, 1982, petitioner filed a "Motion for Additional Time Within Which to Commence Prosecution of [Thompson]." Petitioner requested this additional time in order to allow him to file this instant

Petition for a Writ of Certiorari. Petitioner's motion for additional time, filed with Judge Filippine, has yet to be ruled upon.

The October 14, 1981, opinion of the Eighth Circuit will be found in Appendix A of this petition; the June 4, 1982, opinion of the Eighth Circuit will be found in Appendix B of this petition; the January 14, 1982, Order of Judge Filippine, and the December 17, 1980, "Report and Recommendation" of United States Magistrate Noce will be found in Appendix C of this petition; and, the June 14, 1982, Order of Judge Filippine and petitioner's motion for additional time, filed in response thereto, will be found in Appendix D of this petition.

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JURISDICTIONAL STATEMENT

Title 28 U.S.C. Section 1254(1) states that cases in the Courts of Appeals may be reviewed by this Court

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 U.S.C. Section 2101(c) states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

X

In October, 1977 Thompson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Eastern District of Missouri, Eastern Division. In that petition Thompson challenged the state conviction of murder which was obtained in Mississippi County, Missouri, in 1966. The United States District Court denied the petition on January 14, 1981. However, on October 14, 1981, the United States Court of Appeals for the Eighth Circuit reversed the district court and determined that the writ should issue because Thompson's 1966 conviction was illegal. On July 12, 1982, petitioner filed a Petition for Writ of Certiorari in which was requested that this Court review the Eighth Circuit opinion of October 14, 1981. On April 26, 1982, this Court entered an order granting that petition and thereafter remanded the case to the Eighth Circuit for further consideration in light of *United States* v. *Frady*, 50 U.S.L.W. 4388 (April 5, 1982, No. 80-1595). On June 4, 1982, the Eighth Circuit issued a second opinion basically affirming its conclusion of October 14, 1981. Also, on June 4, 1982, the Eighth Circuit issued its mandate and remanded the case to the district court for further proceedings. On June 14, 1982, the district court issued an order directing the State of Missouri to commence prosecution of Thompson within 60 days; on June 23, 1982, petitioner filed a "Motion for Additional Time Within Which to Commence Prosecution of [Thompson]." Petitioner requested this additional time in order to allow him to file the instant petition. Petitioner's motion for additional time, filed with the district court, has yet to be ruled upon.

The Eighth Circuit's June 4, 1982, decision is properly sought to be reviewed by a request of certiorari to that court and is made 90 days from that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, United States Constitution:

ARTICLE VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 28 U.S.C. Section 2254:

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the

law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the exist-

ing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Section 494.290, RSMo 1959:

494.290. Court may order new panel or additional jurors, when.—Courts having civil and criminal jurisdiction shall have power, whenever the grand or petit jury shall have been discharged, and it shall become necessary to have another jury, to order and require the sheriff, or other proper officer at the same term or session of said court, or at any adjourned or special term of such court, to summon from the citizens of the county having the requisite qualifications for jurors, a new panel of petit or grand jurors, and to order the sheriff or other proper officer to summon a standing petit jury whenever the board of jury commissioners shall have failed to select such petit jury; and whenever a greater number of petit jurors are required than the regular panel, or in case any juror shall fail to attend at the term required, the court may order the sheriff or other proper officer to summon a sufficient number of jurors as the occasion may require.

STATEMENT OF THE CASE

On October 21, 1977, Mr. Douglas W. Thompson, hereinafter Thompson, while a prisoner incarcerated at the Missouri State Penitentiary in Jefferson City, Missouri, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Eastern District of Missouri, Eastern Division, attacking his 1966 conviction obtained in Mississippi County, Missouri, for the murder of a police officer which occurred in Cape Girardeau County, Missouri, on March 10, 1961. The facts relative to this murder are setout in detail in *State* v. *Thompson,* 363 S.W.2d 711 (Mo. banc 1963).

Thompson was originally convicted of the offense at issue here in the Circuit Court of Bollinger County, the case being transferred to that county on a change of venue, in 1961, and sentenced to death. The conviction and sentence affirmed on direct appeal. *State* v. *Thompson,* 363 S.W.2d 711 (Mo. banc 1963). That case will be referred to as Thompson I.

In 1964 Thompson filed a Motion for Post Conviction Relief under Missouri Supreme Rule 27.26. Ultimately, the Missouri Supreme Court vacated the sentence and conviction on the ground that the State had suppressed material evidence, i.e., cartridge cases found at the scene of the shooting and in Thompson's automobile. *State* v. *Thompson,* 396 S.W.2d 697 (Mo. banc 1965). That case will be referred to as Thompson II. Thompson was retried in 1966, convicted, and sentenced to life in prison. No appeal was filed. It is this conviction which is at issue here.

On September 10, 1975, Thompson filed another Motion for Relief from the 1966 conviction under Rule 27.26.

In this motion he alleged that (1) his conviction was obtained by the deliberate use of false and perjured testimony, which allegation included the argument that he was not convicted upon substantial or sufficient evidence; (2) that his conviction violated the prohibition against double jeopardy; (3) that the jury was unconstitutionally selected; (4) that the jury was improperly instructed on the law of the case; and, (5) that the trial court refused to provide him with a copy of the jury instructions. That motion was denied, which denial was affirmed on appeal as to all issues except that concerning whether the jury was unconstitutionally selected. The jury selection issue was remanded for an evidentiary hearing. *Thompson* v. *State,* 576 S.W.2d 541 (Mo.App., 1978). That case will be referred to as Thompson III. In so ruling, the State appellate court determined from the record that Thompson's failure to appeal the 1966 conviction was a deliberate, voluntary, and knowledgeable bypass of his right to appeal. Such bypass, the State appellate court ruled, disposed of Thompson's allegations of instructional error and of the failure to provide him with a copy of the instructions. The State court ruled upon the remaining contentions on grounds other than procedural bypass. The State court determined that Thompson's allegations of the knowing use of perjured testimony was factually identical to the allegation treated by the Missouri Supreme Court in 1965 and that it was precluded by that earlier ruling. The State court also ruled that the claim of insufficient evidence was not cognizable under Rule 27.26. And, the State court overruled Thompson's double jeopardy claim upon the trial record.

On October 21, 1977, Thompson filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Missouri, Eastern Di-

vision, alleging that his 1966 Mississippi County conviction was improper for, basically, those reasons set forth above in his 1975 state attack upon the 1966 conviction. On May 1, 1979, Carl White, Petitioner herein, responded to Thompson's Petition for a Writ of Habeas Corpus by asserting various procedural defenses to Thompson's claims, including the assertion that the federal judiciary was without the authority to review the jury selection issue because of Thompson's failure to contemporaneously object to the jury selection process.

On March 10, 1980, Thompson moved for the removal of the jury selection issue from the State courts to the Federal District Court; on March 26, 1980, Thompson further requested that an evidentiary hearing be held on all issues pending before the District Court, including the jury selection issue. On May 21, 1980, Thompson's motions were granted and evidence was received on July 16 and 26, 1980.

On December 17, 1980, the United States Magistrate, David D. Noce, issued a "Report and Recommendation" concluding that Thompson's 1966 conviction was legal and should be affirmed. Shortly thereafter, United States District Court Judge Edward L. Filippine adopted the Magistrate's "Report and Recommendation" and affirmed Thompson's 1966 Mississippi County conviction.

Upon appeal the Eighth Circuit reversed the decisions of the Magistrate and United States District Court Judge, and the State courts, and concluded that the jury selection process was unconstitutional and therefore Thompson ought to be either freed or retried. The Eighth Circuit concluded that despite any failure of Thompson to contemporaneously object, in 1966, to the jury selection process, the "cause" and "prejudice" test enunciated by this

Court in *Francis* v. *Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), had been met.

Thereafter, on January 12, 1982, petitioner White filed in this Court a Petition for Writ of Certiorari to review the above-referred to October 14, 1981, opinion of the Eighth Circuit. This Court's number for that petition was 81-1319. On April 26, 1982, this Court issued an Order in No. 81-1319 granting petitioner's petition, and pursuant thereto vacated the October 14, 1981, opinion of the Eighth Circuit and remanded the case back to that court for further consideration in light of *United States* v. *Frady*, 50 U.S. L.W. 4388 (April 5, 1982, No. 80-1595). Thereafter, on June 4, 1982, without further briefing or oral argument the Eighth Circuit issued a cursory four page opinion in which it purported to review its October 14, 1981, opinion in light of *United States* v. *Frady, supra;* in an analysis as superficial as the one utilized on October 14, 1981, the Eighth Circuit concluded on June 4, 1982, that "actual prejudice" existed allowing Thompson to raise, and have the federal judiciary decide, his argument that the jury which convicted him was unconstitutionally composed. On the same date, June 4, 1982, in which the Eighth Circuit issued the opinion challenged by petitioner here, that court also issued its mandate in the case remanding back to the district court.

On June 14, 1982, Judge Filippine in the cause styled *Thompson* v. *White*, No. 77-1122 C (3), United States District Court, Eastern District of Missouri, Eastern Division, issued an Order directing, *inter alia*, that the State of Missouri commence prosecution of Thompson within sixty days. Thereafter, on June 23, 1982, petitioner White filed with Judge Filippine a "Motion for Additional Time Within Which to Commence Prosecution of Petitioner" in order to allow petitioner time to file another Petition

for Writ of Certiorari in this Court so that the June 4, 1982, opinion of the Eighth Circuit could be reviewed and reversed.

Petitioner Carl White, Superintendent, Missouri Training Center for Men, Moberly, Missouri, requests that this Court issue a writ of certiorari to the Eighth Circuit so that this Court may review the standards set forth in *Francis* v. *Henderson*, and determine whether the Eighth Circuit's two superficial analyses of that test vis-a-vis the facts in this case is appropriate.

THE REASONS FOR GRANTING THE WRIT

The Eighth Circuit, in its October 14, 1981, stated:

> The sole issue before us is whether the district court erred in its dismissal of the jury selection issue.
>
> The state argues that we are precluded from reviewing the jury selection claim because of Thompson's failure to object at the time of his trial. Thompson responds that he was unaware of the standards concerning the selection of jurors because, at that time, the case enunciating the standards had not yet been decided. Also, Thompson claims that it was unknown to all the parties that the sheriff had deviated from the statutory random selection procedure. In fact, it was not until counsel was appointed by the federal district court in the instant case that the parties discovered the problem and entered into the stipulation which reveals that the entire jury panel was selected by the sheriff.
>
> The bar of a state contemporaneous rule is not absolute. Under the rule enunciated by the Supreme

Court, such a bar can be lifted if adequate cause for the failure to object exists and prejudice to the defendant can be shown. *Wainwright* v. *Sykes*, 433 U.S. 72, 80-91 (1977); *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976).

In the present case both factors are satisfied. In light of the fact that Thompson did not know nor had reason to suspect that the statutory procedure was not being followed, he certainly had 'cause' not to object. We also recognize that the 'grizzly choice' between life imprisonment and execution facing Thompson provided him with an additional incentive not to appeal. *See Fay* v. *Noia*, 372 U.S. 391, 439-40 (1963). As will be discussed later in the opinion, we also find that prejudice existed because the sheriff personally selected the veniremen for the trial of an individual accused of killing another law enforcement officer.

Thompson v. *White*, Eighth Circuit No. 81-1092, October 14, 1981, at Slip Op. 5-6.

Petitioner believes that the Eighth Circuit's examination of *Francis* v. *Henderson*, and its misapplication in this case, dictates that a writ of certiorari be issued.

The Eighth Circuit's opinion not only misconstrues this Court's announced test in *Francis* v. *Henderson*, but disregards and contradicts all other cases on the subject.

First, the Eighth Circuit states that Thompson's lawyer had no reason to suspect that the statutory procedure was not being followed anent the jury selection process, and that therefore he had "cause" not to object.

Initially, Petitioner objects to the Eighth Circuit's conclusion that the jury was selected in violation of Mis-

souri law. The process by which the jury was selected in this case comports with Missouri law which allows a sheriff to go out and select a special venire when an insufficient number of jurors is available. This subject, and the Petitioner's assertion that the jury was constitutionally selected, will be dealt with later. At this point Petitioner's primary thrust is that Thompson has wholly failed to show any "cause" for failing to contemporaneously object to the jury selection process.

In this regard Petitioner points out that the Eighth Circuit's reference to *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 882, 96 Ed.2d 837 (1963) and the "grizzly choice" between life imprisonment and execution is irrelevant to determining whether Thompson has met the "cause" and "prejudice" test of *Francis* v. *Henderson*. What we are dealing with is whether a contemporaneous objection at trial, and during the *voir dire* process, should have been made; the issue is not whether Thompson deliberately bypassed his right to appeal *after* his conviction.

It cannot be over-emphasized that the burden is squarely upon Thompson to unequivocally establish that there was in fact "cause" for his trial attorney's failure to object to the jury selection process, that the jury selection process was in fact unconstitutional, and that "actual prejudice" flowed to Thompson therefrom. As stated by the Court in *Tennon* v. *Ricketts*, 574 F.2d 1243, 1245 (5th Cir. 1978):

> On collateral attack, state is under no burden to show that waiver of right to file timely objections to composition of grand jury was knowingly and understandingly made; to the contrary, he who tardily brings claim must make showing of cause for the failure and must also make showing of actual prejudice.

It may be that the only way a petitioner can establish "cause" for the failure to object to an allegedly unconstitutional jury selection process is by proving incompetency of counsel. *See, Arnold* v. *Wainwright*, 516 F.2d 964 (5th Cir. 1975). But, at the evidentiary hearing held before United States Magistrate Noce, Thompson's counsel in this action, Mr. T. Scott Richardson, stated:

> Mr. Thompson is not alleging incompetency of counsel by Mr. Herd. [Mr. Herd was Thompson's trial counsel in 1966 at Mississippi County.] Quite to the contrary, at the hearing and through any communications with me, Mr. Thompson has had nothing but the greatest of praise for Mr. Herd. On the record, at the hearing, he stated that Mr. Herd saved his life. I certainly don't think that statement is consistent with an allegation of incompetency of counsel.
>
> The issue is not incompetency of counsel. . . .

United States District Court Hearing Transcript (St. Louis) at p. 26.

Mr. Herd testified before Magistrate Noce that he did not attack the jury selection process for tactical reasons. Mr. Herd testified, anent this issue, as follows:

> Q. [By Mr. Richardson:] You, of course, conducted a *voir dire* examination at that time?
>
> A. [By Mr. Herd:] I did.
>
> Q. Did you make any inquiries as to the jury selection procedures in Mississippi County as they were handled at that time?
>
> A. In full answer to that, I would have to tell you that I retained counsel—his name was Jim Haw. I went down a couple of days beforehand to get my

last-minute preparation done, and I went over entirely with him the jury list. I am sured that he told me, at that point, generally how the jury was selected in the sense that who would be on the jury, what I would be seeing, etc.; but I don't recall that the jury selection process, as such, was ever discussed.

Q. This was in 1966; correct:

A. Yes, sir.

Q. You made no motion to quash the entire jury panel based on any type of unconstitutional jury selection procedures?

A. No, sir, because I was unaware there was any basis to do so, in fact.

Q. This was, in fact, before many of the landmark decisions about jury selection procedures,

A. I would have to say it was. It never occurred to me because I felt—it never occurred to me. I have to say that, very frankly.

Q. Furthermore, for the record, Mr. Thompson is a white individual; is that true?

A. Yes, sir.

Q. And the jury selected—let me ask you that—the jury veniremen that were summoned, was there any black individuals on the jury?

A. There were.

Q. The twelve men that were selected for the jury, were there any blacks on there?

A. No, there were not.

Q. Did you strike any black individuals if you will recall?

A. I have my trial notes here and I went over that last night understanding what I thought the issues that I would be interrogated about would be here today. My notes are not conclusive about that. I know there were blacks on the jury because I have them marked as blacks.

Q. You were talking about the venire panel?

A. I am sorry, on the venire panel. I think there were total of about sixty veniremen who were *voir dired*, and they were done in groups of about a dozen at a time, and, unfortunately, my notes are not so complete that I can answer your question with great exactness. But I do know that there were blacks on the panel. My notes seem to indicate that there were three. I do know that there were none on the jury ultimately selected to hear the case. I do know that there were reasons why I would not want them on the jury in that county, and it may be that is why they were—it may be I struck them off, but my notes do not clinically reflect that I, in fact, did so.

Q. Could you expand upon the reason why you would not want a black that was brought in on a venire call to be called on your jury in that case?

A. Prior to going over to Mr. Haw's office—that's H-a-w for the record, I think that's the way he spells his name—I was told he was a very competent trial lawyer and that he tried a number of criminal cases and had recently tried a case involving a black murder case—that is to say, where the victim was black and where the defendant was black.

I have been told that of the lawyers available locally he was the man to contact. So, I took the jury list to him; and we talked about every name on that list at great length. And I have notes here with me here today that reflect some of the impressions that he gave me concerning not just the veniremen but those who ultimately were left on the panel on the jury.

And during my conversations with him, I talked about blacks because, very frankly from a defendant's standpoint, I think there is a great advantage to having blacks on a jury. I have always felt that way because I think they understand such things as police brutality and such in a way that no white man can ever understand it. These things were candidly discussed with Mr. Haw and me.

But he told me a piece of psychology, and he gave me a warning about the use of blacks in that county. And I wanted to make certain in this record I am not speaking like a bigot. I have had black jurors time after time, and I prefer them in a criminal case. But he indicated to me that in Mississippi County in those days that blacks—I don't know how to express it other than to say kowtow to whites—and that there were very few blacks who had meaningful jobs in society and very few blacks were on professional positions, if any, that the majority of blacks in that county were sharecroppers and were left over from the cotton fields and that on any windy day, in his judgment, they could not stand up to the expression of an opinion contrary to theirs given by the white man, and that was due to the social complexion of that county at the time as he explained it to me.

> And therefore, I did not feel that I wanted on this jury anybody who didn't have the guts in his belly and who would be afraid to stand up for his convictions. And that, sir, is the reason why I would not have considered seriously blacks for this jury.
>
> I am not certain that I did strike blacks; but if I did so that would probably have been the reason. I don't know if that hurts or helps Wayne Thompson, but that is the honest truth.
>
> May I add one thing to my last statement?
>
> I was asked why I wouldn't want blacks. I would say there were, obviously, many other types of people who I would not want on that jury for that case and they were also discussed, they had nothing to do with racial complexion.

United States District Court Hearing Transcript (St. Louis) at pp. 62-64.

It goes without saying that a tactical decision on the part of an attorney is wholly insufficient "cause" to allow the Federal judiciary to review the substance of an inmate's jury selection claim. As stated by the Court in *Satterfield* v. *Zahradnick*, 572 F.2d 443, 446 (4th Cir. 1978):

> We need not attempt to place precise limits on the meaning of cause to observe that this type of calculated, tactical trial decision has never been held to avoid the preclusive effect of state procedural defaults in subsequent federal habeas proceedings. [Citations omitted.]

See also, *Rodriguez* v. *Estelle*, 536 F.2d 1096 (5th Cir. 1976). It is also enlightening to read what the Court in *Arnold* v. *Wainwright*, *supra*, had to say in this regard:

> In Florida the rule is well established that challenges to the petit jury selection system must be mounted prior to the question of any individual juror. Without attempting to hypothesize a set of circumstances sufficient to excuse failure to make a timely jury challenge, we hold here simply that a petitioner whose attorney takes no steps to determine whether there is any basis for such a challenge may not later utilize federal habeas corpus procedure to obtain relief from his waiver under state procedural rules.

Id., 516 F.2d at 972. And, as stated by the Court in *United States* v. *Hawkins*, 566 F.2d 1006, 1013 (5th Cir. 1978):

> 'One who fails to assert challenges before or during voir dire is foreclosed from later tardy actions which attack the validity of the jury plan.' [Citations omitted.]

Furthermore, the transcription of the 1966 Mississippi County trial establishes that Mr. Herd engaged in detailed, extensive, and exhaustive *voir dire* at Thompson's 1966 Mississippi County trial (Mississippi County Circuit Court Transcript at pp. 41-228). Seventy-two potential jurors were called and examined by both Mr. Herd and the prosecuting attorney, Mr. Burlison. An examinaion of the relevant one hundred and eighty pages of the Circuit Court Transcript reveals that Mr. Herd vigorously represented Thompson by pointedly and forcefully questioning all seventy-two potential jurors. The most striking fact to be derived from those one hundred and eighty pages is that at no time did Mr. Herd object, in any way, to the method by which the jury selection system proceeded; indeed, and most dispositively, Mr. Herd at no time inquired into the nature of that process.

In light of the foregoing it is extraordinary that the

Eighth Circuit helps Thompson over the "cause" hurdle of the *Francis* v. *Henderson* test solely by use of the following phrase: "Thompson did not know nor had reason to suspect that the statutory procedure was not being followed. . . ." This is an incredible statement in light of what has been presented. Not only did Mr. Herd engage in vigorous and extensive *voir dire* examinations, he contacted competent local counsel to help him with the jury selection process. Mr. Herd testified that he had no reason to object to the jury selection process, and made no effort to determine what process was used in gathering together the veniremen. The Eighth Circuit decided to ignore not only the facts in this case but all the decisional law which pertains to it. There is no other case that so blithely does away with an attorney's obligation to ferret out, investigate, and conclusively determine the procedure used in a jury selection process. Unquestionably, it is defense counsel's duty to make such an investigation and determine the process used; if the defense attorney does not investigate the jury selection process he can not later come into court and argue that although he chose not to investigate the jury selection process during the trial he may now attack the alleged illegality since he has discovered irregularities in that process many years after conviction. Indeed, it is inconceivable that Mr. Herd did not investigate the whole jury selection process in light of his testimony that he went over the veniremen in detail with local counsel. Mr. Herd further testified that the reason he did not attack the jury selection process was because he did not think it was illegal. Whether that conclusion was erroneous on his part, in hindsight, is irrelevant. Mr. Herd made a tactical decision not to attack the jury selection process, which he clearly investigated, and found legal. Additionally, it must be noted that this trial occurred in December 1966, yet *Swain* v. *Alabama*, 380 U.S.

202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) a decision Thompson's present lawyer has called the "landmark" case in the area, was decided March 8, 1965; so, some lawyers out there were thinking about jury selection processes eighteen months before Thompson's trial. At least Swain's lawyers had thought about it.

Indeed, the October 14, 1981, opinion of the Eighth Circuit affirmed by that court on June 4, 1982, is directly contrary to this Court's recent decision in *Engle* v. *Isaac*, 50 U.S.L.W. 4376 (April 5, 1982, No. 80-1430). In *Engle* this court had occasion to discuss the "cause" prong of the test found in *Francis* and *Wainwright*. In *Engle* Isaac's attorney failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions. It was argued before this Court that Isaac's attorney had "cause" for failing to contemporaneously object to the pertinent jury instructions because "they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses. [And], they contend that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to bear the burden of proving this affirmative defense." It was urged in *Engle* that a criminal defendant "may not waive constitutional objections unknown at the time of trial."

Such a claim is identical to the one put forth by Thompson in the lower courts, and accepted as sufficient "cause" by the Eighth Circuit.

In response to this contention this Court stated:

> "We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary

> vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair. These concerns, however, need not detain us here since respondents' claims were far from unknown at the time of their trials."

Engle, 50 U.S.L.W. at 4382. [Footnotes omitted.] In the instant case, petitioner has established that the jury selection process at issue here had been raised in *Swain* v. *Alabama, supra,* eighteen months before Thompson's trial. Petitioner does not believe that it required extraordinary vision for Mr. Herd to have inquired into the process by which the jury was selected and composed; indeed, it has been established that Mr. Herd took extraordinary precautions in regard to the composition of the jury, and questioned the veniremen at considerable length and in extraordinary detail. The Eighth Circuit's conclusion, both in its October 14, 1981, and June 4, 1982, opinions, to the effect that Thompson met the "cause" prong of the *Francis* and *Wainwright* test because he "did not know nor had reason to suspect that the statutory procedure was not being followed," is certainly without support either in case law or from the record in the instant case. Indeed, this Court also stated in *Engle:*

> "We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against label-

ing alleged unawareness of the objection as a cause for a procedural default."

Engle, 50 U.S.L.W. at 4383. [Footnote omitted.] The situation in *Engle* is despositively analogous to that presented in the instance case. Certainly, Mr. Herd had the tools and information at his command to attack the jury selection process if he choose to do so; similarly, at the time of Thompson's trial which resulted in the conviction at issue here, other defense counsel perceived the possibility of unconstitutionally composed jurys and proceeded to timely litigate those claims. Again, in this regard, petitioner notes that the Eighth Circuit's opinions of October 14, 1981, and June 4, 1982, blithely ignore both the record in this case and are axiomatically directly contrary to the above quotes taken from this Court's opinion in *Engle*.

Finally, this Court stated in *Engle:*

> "We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ, may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution."

Engle, 50 U.S.L.W. at 4381. The above quote directly relates to the instant case. Thompson's commission of murder occurred in 1961, and the trial proceedings attacked by Thompson occurred in 1966. Self-evidently, retrial of Thompson at this stage is virtually an impossibility. Certainly, memories of any witnesses which may still be alive will have been blurred and diminished. Indeed, dispersion of witnesses who remain alive may also represent an impossible hurdle to the retrial of Thompson.

In light of the foregoing Petitioner posits that it was fundamental error for the Eighth Circuit to have concluded that there was "cause" for Mr. Herd not to make a contemporaneous objection at Thompson's 1966 Mississippi County trial.

Similarly, the Eighth Circuit has erroneously come to the conclusion that "actual prejudice" flowed to Thompson by virtue of the jury selection process. In this regard the Eighth Circuit states: "We also find that prejudice existed because the sheriff personally selected the veniremen for the trial of an individual accused of killing another law enforcement officer." In coming to this conclusion the Eighth Circuit chose to ignore a statement of Mr. Herd's made at the evidentiary hearing held before Magistrate Noce. Mr. Herd was asked if Thompson received a fair trial in 1966. Mr. Herd replied: "I believe that Wayne Thompson had as a substantial and fair trial as our system with all its imperfections admits to."

> Q. [By Mr. Richardson:] I understand your answer to that question, Mr. Herd, and if I ask you if you felt that he had a fair trial, if the jury selection procedure maintained in use at that time in Mississippi County had previously been determined to be unconstitutionally applied by the Eighth Circuit Court of Appeals would you still feel that Mr. Thompson got a fair trial?
>
> A. I would have to say that it wouldn't make much difference what I felt if the process was innately unconstitutional then he did not have a fair trial. But I would have to say that we did the best we could to select a jury that we felt was best for him. And I am convinced, having reviewed my notes, that the jury that he had was not an innately prejudiced jury against him.

United States District Court Hearing Transcript (St. Louis) at pp. 80-81.

In coming to its conclusion that Thompson was "actually prejudiced" by the jury selection process the Eighth Circuit has made unsupported inferences from the record. The record establishes that the sheriff involved selected veniremen in a county not in any way contiguous, and in fact separated by another county, from the county in which the crime was committed; the Eighth Circuit ignored the fact that the sheriff selected veniremen five years after the offense had occurred; the Eighth Circuit also ignored the fact that the sheriff who picked the veniremen played absolutely no part in the investigation of the crime; the Eighth Circuit further ignored the fact that the record unequivocally establishes that the sheriff who picked the veniremen did not discriminate against them for any illegal reason and chose only those people who were qualified by law. The Eighth Circuit has made the extraordinary *assumption,* unsupported by the record, that because a sheriff in a separate county in regard to a crime that occurred five years earlier selected veniremen, those veniremen must have had a prosecution bias. There is simply no support for such a statement in the record.

Petitioner assumes that it was in light of the foregoing reasons that this Court on April 26, 1982, vacated the Eighth Circuit's opinion and remanded the case back to that court for further consideration in light of *U. S.* v. *Frady,* 50 U.S. L.W. 4388 (April 5 ,1982, No. 80-1595). Basically, this Court concluded in *Frady,* that an inmate collaterally attacking his conviction upon a ground not contemporaneously objected to at trial must clear a significantly higher hurdle than the "plain error" standard in order to meet the "actual prejudice" prong of the *Francis* and *Wainwright* test in order to have his claim

cognizable in federal court. As this Court stated in *Frady*:

> "Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they work to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

Frady, 50 U.S.L.W. at 4393. [Emphasis in original.]

In this regard it is beyond petitioner's ken how the Eighth Circuit could have found that Thompson met the standard this Court has set out anent the "actual prejudice" prong of the *Francis* and *Wainwright* tests; there is absolutely no evidence in the record showing that Thompson was prejudiced in any way or that his entire trial was somehow infected with prejudice and disadvantage of constitutional dimension; this is especially true in light of the fact that Thompson's retained trial attorney in 1966, Mr. Herd, testified at the evidentiary hearing held before Magistrate Noce "that the jury that he had was not an inately prejudiced jury against him." Mr. Herd also testified at that hearing: "I believe that Wayne Thompson had as a substantial and fair trial as our system with all its imperfections admits to."

It is extraordinary that on June 4, 1982, the Eighth Circuit could have issued a second opinion, in light of this Court's directive of April 26, 1982, in which the Eighth Circuit once again found "actual prejudice" sufficient to allow Thompson to bring his claim in federal court. Petitioner states that the only "actual prejudice" found by the Eighth Circuit comes from its overactive imagination; there is certainly no evidence in the record to support such a fantasy. The following three paragraphs contain the sole reason the Eighth Circuit utilized in concluding that "actual prejudice" existed:

"Turning to the element of "actual prejudice," we are satisfied that under the facts of the case "actual prejudice" existed. We reach our holding in light of the facts that the selection of the jury to hear the case of the murder of a police officer was by a fellow law enforcement officer and that the sheriff selected the entire jury panel. The parties stipulated "Sheriff Simmons personally selected potential jurors on the basis of people he knew whom 'he thought would make good jurors.'" Thompson v. White, *supra*, 661 F.2d at 105-107.

By placing such a person in charge of selecting the jury, defendant was deprived of due process. As an example of the prejudice that must be shown to satisfy the "actual prejudice standard," the Supreme Court in *Frady* referred to Henderson v. Kibbe, 431 U.S. 145, 154 (1977), wherein the Court held that in a collateral attack of a conviction pursuant to 28 U.S.C. § 2254, the contested jury instruction must have "so infected the entire trial that the resulting conviction violates due process." (Citations omitted) United States v. Frady, *supra*, 50 U.S.L.W. at 4392.

As we have said previously in this case "[t]he potential for a conviction prone jury under such a system is substantial. . . . [F]undamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking from his acquaintances." (Citations omitted). Thompson v. White, *supra*, 661 F.2d at 106 n.7 (quoting Henson v. Wyrick, 634 F.2d 1080, 1082-83 (8th Cir. 1980), *cert. denied*, 450 U.S. 958 (1981)). Clearly, the taint inflicted on the proceedings by the use of this jury selection technique satisfies the Supreme Court's actual prejudice" test as outlined in *Frady*."

Appendix A at 3-4.

Petitioner believes that the Eighth Circuit found "actual prejudice," as defined by this Court in *Frady*, because it wanted to and not because there is any evidentiary support for such a conclusion. The only evidence in the record on this issue comes from Mr. Herd, to the effect that Thompson received a fair trial and that the jury was not inately prejudiced against him. In light of such testimony, how the Eighth Circuit can conclude that Thompson has shown substantially more than "plain error," how it confirmed that he has shown that the entire trial was infected with prejudice and unfairness, is not only extraordinary, it smacks of arbitrary and capricious judicial make-believe.

Because of the fundamental legal errors made by the Eighth Circuit, the importance of this case and the direct contradictions between the two Eighth Circuit opinions and this Court's opinions in *Frady* and *Engle*, petitioner requests that this Court issue a writ of certiorari. Recently, this Court in *Frady* and *Engle* more clearly defined the definitions of "cause" and "actual prejudice" found in *Francis* and *Wainwright;* in this case this Court has the opportunity to correct the contradictions between the two Eghth Circuit opinions sought to be reviewed here and this Court's opinions in *Frady* and *Wainwright* and in so doing narrow the extraordinarily broad meaning of those terms utilized by the Eighth Circuit. Indeed, the Eighth Circuit's definition of "cause" and "actual prejudice" is so nebulous and so broad that the *Francis* and *Wainwright* test is made virtually irrelevant.

Even assuming, for the sake of argument only, that Thompson has met his "cause" and "actual prejudice" test, petitioner Missouri requests that this Court issue a writ of certiorari to the Eighth Circuit because the jury selection procedure employed in this case was not illegal.

The Eighth Circuit opinion at issue here is fascinating in that it never reaches the issues of whether the jury was illegally and unconstitutionally composed. While the Eighth Circuit came to the conclusion that Thompson had met the *Francis* v. *Henderson* test and thus could raise in the federal judiciary the issue of whether the jury was unconstitutionally composed, the Eighth Circuit never reached nor discussed that issue. First, the Eighth Circuit concluded that there was cause for Thompson's failure to contemporaneously object in 1966 to the jury composition process. Then, the Eighth Circuit found that "actual prejudice" existed in connection with the jury selection process because the sheriff selected the veniremen. The Eighth Circuit assumed that because it found "actual prejudice" the conviction should be overturned. However, the Eighth Circuit never discussed nor reached the crucial issue, which is whether, in fact, the jury selection process was unconstitutional. It is unusual that the Eighth Circuit reversed Thompson's conviction without discussing whether or not the jury was actually illegally and unconstitutionally composed. If for no other reason than this, the Eighth Circuit opinion cannot stand because although it found, that "cause" and "actual prejudice" existed sufficient for the federal judiciary to take cognizance of the jury selection issue, it never found that the jury selection process was unconstitutional.

The sole evidence adduced anent the jury selection process is a one page "Stipulation" filed by the parties in the District Court on or about October 10, 1930. That Stipulation states:

> It is hereby stipulated and agreed between the parties that if W. S. Simmons of Charleston, Missouri, would testify his testimony would be as follows:

1. That W. S. Simmons was a duly-elected sheriff of the County of Mississippi, State of Missouri, during the month of December 1966.

2. That during the month of December 1966, the judge of the Circuit Court of Mississippi County, State of Missouri, entered a special venire facias directing Sheriff Simmons to summon approximately 72 citizens of Mississippi County for jury service on December 20, 1966, for the trial of petitioner herein, Douglas Wayne Thompson.

3. That in the process of executing this special venire facias Sheriff Simmons in his office sat down and made out summonses for various individuals to be served upon said individuals to satisfy this special venire facias.

4. That Sheriff Simmons did not use the Mississippi County Master Jury List in picking these names but simply chose people that he knew and that he thought would make good jurors.

5. Sheriff Simmons will testify that the only criteria he used was that he chose people that he thought would answer questions truthfully on voir dire examination and who were at least twenty-one years old with no criminal convictions.

6. Sheriff Simmons will testify that he chose approximately seven black individuals.

7. Sheriff Simmons will testify that he knew the character of the case, it being a case transferred on change of venue from Cape Girardeau County wherein the Defendant was charged with the murder of a police officer.

The State law in this regard is found in § 494.290, RSMo 1959:

> Courts having civil and criminal jurisdiction shall have power, whenever the grand or petit jury shall have been discharged, and it shall become necessary to have another jury, to order and require the sheriff, or other proper office at the same term or session of said court or at any adjourned or special term of such court, to summon from the citizens of the county having the requisite qualifications for jurors, a new panel of petit or grand jurors, and to order the sheriff or other proper officer to summon a standing petit jury whenever the Board of Jury Commissioners shall have failed to select such a petit jury; whenever a greater number of petit jurors are required than the regular panel, or in case any juror shall fail to attend at the term required, the court may order the sheriff or other proper officer to summon a sufficient number of jurors as the occasion may require.

In order for Thompson to prevail in his claim that the jury was unconstitutionally composed, he must sustain his burden of proving purposeful discrimination. This burden has recently been reinstated by this Court in *Duren* v. *Missouri*, 439 U.S. 357, 58 L.Ed.2d 579, 586-587, 99 S.Ct. 664 (1979):

> In order to establish a *prima facie* violation of the fair-cross-section requirement that defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due

to systematic exclusion of the group and the jury-selection process.

Thompson has not met the three part conjunctive test stated by this Court in Duren. Thompson has been unable to show, either by figures and statistics, or by the testimony of Mr. James Herd, that any "distinctive" group in the community was excluded from either the venire or the petit jury. Similarly, Thompson has not shown that any "distinctive" group was not represented in a fair and reasonable relation to the number of such persons in the community. Finally, there is absolutely no evidence in the record to show that W. S. Simmons engaged in the systematic exclusion of any particular "distinctive" group in the jury selection process. There is nothing per se unconstitutional about the "key man" system. *Carter* v. *Jury Commission*, 396 U.S. 320, 331-337 (1970). It is only when that system is coupled with a sufficient indication of actual discrimination that a *prima facie* case of an unconstitutional selection procedure has been made. In the circumstances of this case Thompson has failed to show any purposeful discrimination of any group, or that the jury was somehow biased against him. As stated by the Court in *Shrader* v. *Riddle*, 401 F.Supp. 1345, 1349 (1975):

> The Constitution doesn't [sic] speak to the manner a state chooses in compiling its jury lists. It merely implies that the petit jury must be selected from a representative cross-section of the community. *Smith* v. *Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed 84 (1940)....
>
> • • •
>
> ...[M]any states leave the discretion of choosing a jury list in a single individual's hands and absent any intentional exclusion of one segment of the com-

munity by this individual, the procedure is considered a fair one. *Fay* v. *New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947).

Petitioner agrees with the "Report and Recommendation" of the United States Magistrate Noce [App. B] that Thompson has failed to establish that the 1966 jury selection process was unconstitutional.

While the method employed in this case for the selection of the venire may not have been the best system available, it remains constitutional until Thompson carries his burden and establishes that the process used excluded in identifiable group or otherwise results in an under representation of a "distinctive" group in the community. This burden Thompson has failed to sustain.

As established earlier, § 494.290, RSMo 1959, permitted just a type of venire selection process that was utilized in this case. Assuming, arguendo, that the selection process employed by W. S. Simmons violated State law, that does not amount to federal constitutional error unless there is a showing of exclusion of an identifiable group. See *Cobbs* v. *Robinson*, 528 F.2d 1331, 1341-1342 (2nd Cir. 1975), *cert. denied* 424 U.S. 947 (1976), and cases cited here. Such a showing has not been made by Thompson.

In summary, on this point, Petitioner believes that the Eighth Circuit failed to carry out its duty and determine not only whether Thompson could raise the jury selection issue, but if it concluded that he could, whether that jury selection process was valid. As noted, the Eighth Circuit only reached the question of whether the *Francis* v. *Henderson* test was met; the Eighth Circuit never discussed whether the jury selection process was, in fact, unconstitutional. Certainly, it is not enough to find that

an issue is cognizable in a Federal Court, in order for a writ of habeas corpus to issue a Federal Court must find some error of constitutional magnitude sufficient to justify a requirement that the State either retry or free a particular inmate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

MICHAEL H. FINKELSTEIN
Assistant Attorney General

8th Floor, Broadway State
Office Building
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner